No. 12,735

United States Court of Appeals

For the Ninth Circuit

H. L. JONES, individually and doing business under the style and trade name of STANDARD SEED FARMS COMPANY,

Appellant,

vs.

THE BARTELDES SEED COMPANY (a corporation),

Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

The basis upon which it is contended that the United States District Court, Northern District of California, Northern Division, had jurisdiction over the subject matter in the present Court is because of the diversity of citizenship of the plaintiff and the defendant, as shown in paragraph I of the Complaint, page 3 of the transcript of record; and that the subject matter involved is over the sum of Three Thousand ($3,000) Dollars, exclusive of interest and costs, as shown in the prayer of the original com-

plaint, beginning on page 8 of the transcript of record. Title 28—Section 1332 U.S.C.A.

The basis upon which it is contended that the United States Court of Appeals for the Ninth Circuit has jurisdiction in the appeal of this matter is that final judgment was entered in the District Court of the United States in and for the Northern District of California, Northern Division, as shown on page 40 of the transcript of record; and that the procedure for appeal to the Ninth Circuit Court of Appeals has been followed by the parties. Title 28—Section 1291 U.S.C.A.

SPECIFICATIONS OF ERROR.

1. The Court erred in not finding that the law of the State of California governed the performance of the contract which is the subject of this action.

2. The Court erred in not finding that the disclaimer clause set forth in plaintiff's exhibit No. BII negatived any expressed or implied warranty as to the description of the seed sold.

3. The Court erred in not finding that custom and usage in the seed business became an integral part of the contract of sale and negatived any expressed or implied warranty as to the description of the seeds sold.

4. The Court erred in denying defendant's motion to amend the Findings of Fact and Conclusions of Law.

SUMMARY OF FACTS.

This is an action for breach of warranty in the sale of onion seeds between two established seed houses who had done business over a period of thirty (30) years, and both of whom used and knew of standard seedmen's disclaimer not to warrant the variety of seeds sold.

The reason for this refusal to warrant seeds is due to the fact that onion seeds are not distinguishable as to variety and type from each other until they have matured into the grown onion.

The Appellant in his course of business, as a grower and seller of seeds, on or about the 18th day of October, 1943, sent to the Appellee, and others in the seed business, a surplus list of seeds that he had in stock and were available for sale. The surplus list had plainly printed on it the refusal to warrant the seeds sold.

On October 20, 1943, the Appellee through Mr. Stubbs, its manager, from its office in Denver, Colorado, telephoned the Appellant in Stockton, California and offered to buy two thousand (2,000) pounds of Yellow Globe Danver onion seed at Two and 50/100 ($2.50) Dollars per pound; said seed being in the surplus list at Three and 00/100 ($3.00) Dollars per pound. The Appellant accepted the offer and was instructed to ship the seeds via Pacific Intermountain Truck to the Appellee in Denver, Colorado. The terms of the sale were "net cash, f.o.b. Stockton." Other than the disclaimer of warranty in the

surplus list no mention was made of warranty or refusal to warrant.

Subsequent to the telephone conversation Appellee confirmed the seed purchase and terms of the sale by telegram and by letter.

On the 20th of October, 1943, the seeds were shipped according to instructions via Pacific Intermountain Truck to the Appellee in Denver, Colorado. To secure payment of the purchase price with the seed was sent a sight draft bill of lading drawn to the order of Appellant. The draft was honored by the Appellee.

Subsequent to the receipt of the seeds, the seeds were relabeled by the Appellee and one thousand (1,000) pounds of the Yellow Globe Danvers were sold to the Dutch Valley Growers of Illinois.

The Dutch Valley Growers planted the seed and when the seed matured into an onion it did not have the characteristics of the Yellow Globe Danver variety. The Dutch Valley Growers brought suit against the Appellee for breach of warranty, and after a jury trial of one week they recovered judgment in the amount of $4,684.00 and $322.26 as costs. The Appellee now brings this action for $5,006.26 as rendered against it in the prior action and for $8,402.59 which they allege as reasonable attorney's fees, and costs to defend this prior action.

THE LAW GOVERNING THE PERFORMANCE, BREACH AND MEASURE OF DAMAGES INVOLVED IN THIS CONTRACT.

Before we can determine the rights of the respective parties under the contract as above set forth we must first determine the law of which State we shall apply to the performance, breach of performance and rights to damages.

The California law on this matter is consistent with the Restatement of Conflict of Laws, A.L.I.

Section 1646 of the Civil Code of California provides that a contract is to be interpreted according to the law and the usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made.

The Restatement of Conflict of Laws, A.L.I., provides as follows in regard to the performance of contracts:

"Section 355. Place of Performance.

The place of performance is the State where, either by specific provision or by interpretation of the language of the promise, the promise is to be performed."

"Section 358. Law Governing Performance.

The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:

(a) the manner of performance;

(b) the time and locality of performance;

(c) the person or persons by whom or to whom performance shall be made or rendered;

(d) the sufficiency of performance;

(e) excuse for non-performance."

"Section 361. What Amounts to Performance.

The law of the place of performance determines the details of the manner of performing the duty imposed by the contract."

"Section 370. Law Determining Breach of Performance.

The law of the place of performance determines whether a breach has occurred."

"Section 372. Right to Damages and Measure of Damages.

The law of the place of performance determines the right to damages for a breach of a contract and the measure of the damages."

The Colorado and the California annotations to the Restatement of the Law of Conflict of Laws support the principles above set forth.

The following authorities are cited in support of the proposition that the law of the place of performance governs the method and manner of performance:

Bertonneau v. S.P. Co. (1917) 17 C.A. 439; 120 P. 53;

Flittner v. Equitable Life Assur. Soc., 30 C.A. 209; 157 P. 630;

Pray v. Trower Lumber Co. (1940) 101 C.A. 482; 281 P. 1036;
Blair v. N.Y. Life Co. (1940) 40 C.A. (2d) 494; 104 Pac. (2d) 1075;
Hayter v. Fulmor (1944) 66 C.A. (2d) 554; 152 Pac. (2d) 746;
Monarch Brewing Co. v. Meyer Mfg. Co., 130 F. (2d) 582;
Tuller v. Arnold, 93 Cal. 166; 28 P. 863.

The alleged failure of performance to deliver Yellow Globe Danver onion seed ordered by the Appellee in this case occurred in California when the seed was delivered according to instructions to the Pacific Intermountain Truck Lines to be carried to the Appellee in Denver, Colorado. Nothing further remained for the Appellant to do under the terms of the contract, and nothing remained for the Appellee to do other than to pay the purchase price.

DID THE FACT THAT THE GOODS WERE SHIPPED TO THE APPELLEE WITH A SHIPPER'S ORDER BILL OF LADING CHANGE THE PLACE OF PERFORMANCE?

This question is answered in the negative in clear unequivocal language by the Uniform Sales Act as incorporated in Section 1740(2) of the Civil Code of the State of California.

Prior to the adoption of the Uniform Sales Act there was a conflict of authorities in the United States on the question of whether or not title remained in the seller until the goods arrived at their destination. 60

A.L.R. 677; 101 A.L.R. 298. The California Courts in the case of *Puritas Coffee and Tea Company v. De Martini,* 58 Cal. App. 628, 206 Pacific 96, in 1922 prior to the adoption of the Uniform Sales Act held that the title remained in the seller until the goods arrived at their destination. However, the enactment of the Sales Act in California overruled this Court decision. This Court's attention is called to the clearness of the act,

> "1740. Reservation of right of possession or property when goods are shipped.
>
> (2) Order of Seller. Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

and the interpretation placed on it in the case of *Alderman Brothers v. Westinghouse Air Brake Co.* (1918) 92 Conn. 419, 103 Atl. 267, 60 A.L.R. 691.

> "One question raised was what effect should be given under the Sales Act to the fact that the bill of lading was drawn to the seller's order endorsed in blank and forwarded to the seller's agent at the place of destination with a sight draft attached. The Court, in holding the title passed at the time of the contract of sale and that the effect of drawing the bill of lading to

> the seller's order was merely to reserve the jus disponendi, said, 'It makes no difference to buyer who has agreed to pay the freight whether a sight draft is presented to him attached to a bill of lading drawn to his own order or to a bill of lading drawn to the order of the seller and endorsed in blank. In either case he must pay his draft in order to get possession of the goods, and in either case his rights on paying the draft are the same. The risk of loss unquestionably passes to the buyer in the former case as soon as the goods are delivered to the carrier. Section 22 of the Sales Act provides it shall pass to the buyer at the same time in the latter case, provided the seller's purpose in drawing the bill of lading to his own order was merely to secure payment of the draft."

The testimony of the Appellant on page 81 of the transcript of record in answer to the question why a shipper's bill of lading was used stated that this method was used to secure the payment of the purchase price. In plaintiff's exhibits V and VI the Appellee agreed to pay the purchase price by air mail or on receipt of the invoice and suggested that the Appellant ship the goods and draft on Colorado National Bank of Denver, should he so prefer. In analyzing these exhibits we can see the thoughts of the parties that this purchase was to be a cash transaction, and that the Appellant used this method to secure payment of the purchase price. Therefore applying the facts in the case to the law as incorporated in Section 1740, paragraph 2, it is the Appellant's

contention that the sending of the seller's order bill of lading with a sight draft attached was done solely for security purposes, and that the title passed when seed was delivered f.o.b. Stockton, California, to the carrier designated by the Appellee and that Stockton was the place of performance.

THE NEXT QUESTION THEN ARISES DID THE FACT THAT THE GOODS WERE SHIPPED F.O.B. HAVE ANY EFFECT ON THE PLACE OF PERFORMANCE?

This question is answered in the affirmative by our California Court. The general rule of law applicable to this type of shipment is that if the agreement is to sell goods f.o.b. at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of f.o.b. depends upon the connection in which it is used, and if used in connection with words fixing the price only it will not be construed as fixing the place of delivery.

Johnson v. Banta (1948) 87 Cal. App. 907, 198 Pac. (2d) 100;

Gallo v. Boyle Manufacturing Company, 35 Cal. App. 168, 169 Pac. 401.

Observing plaintiff's exhibits V, VI and VII, it is very obvious that all the seeds that were offered for sale and purchased were listed at a certain price per pound. All purchases regardless of quantity were to be made f.o.b. Stockton, California. In the instant case the terms of the contract as shown in the surplus list

and the telegram confirming the sale and in the letter confirming the sale were two thousand (2,000) pounds of Yellow Globe Danver onion seed at Two and 50/100 ($2.50) Dollars per pound, along with various other seeds as shown in the exhibits, all shipments to be made f.o.b. Stockton, California.

From these facts the logical assumption to be drawn was that the seeds were sold by the pound and that the term f.o.b. in no way affected the purchase price, and hence the conclusion that the place of delivery and performance of the contract in this instant case was in Stockton, California, when the goods were delivered to the carrier designated by the Appellee.

WHAT TYPE OF SALE WAS INVOLVED?

This was a sale of goods by description. This Court will note in plaintiff's exhibits V, VI and VII that the onion seed which is the subject of this action was described as Yellow Globe Danvers onion seed, which is a distinctive kind of onion seed, and is recognized as such in the seed trade.

The deposition of Mr. W. P. Stubbs on page 49 of the record shows that he used the term "Yellow Globe Danvers Onion Seed" in his offer of purchase, and that the Appellant accepted his offer.

The logical effect of a sale of goods by description is brought forth in the California Civil Code, in Section 1734, which states: "that where there is a con-

tract of sale or a sale of goods by description there is an implied warranty that the goods shall correspond with the description. Therefore in this case there was an implied warranty that the onion seed sold to the Appellee would answer the description of Yellow Globe Danvers.

WHAT EFFECT DID THE NON-WARRANTY CLAUSE IN THE SURPLUS LIST HAVE ON THE IMPLIED WARRANTY?

The non-warranty (or disclaimer) as shown in paragraph V of the plaintiff's exhibit VII on page 144, negatived any implied warranty that the onion sale would answer the description of Yellow Globe Danvers. In order to bring before the Court the reason that the non-warranty clause as contained in plaintiff's exhibit VII negatived any implied warranty we feel that it is worth while to set forth the seed law as developed in the United States.

The leading case on the subject of disclaimer of warranty which contains an excellent statement of the reasons for the validity of a disclaimer of warranty is *Ross v. Northrup* (1914) 156 Wis. 327, 144 N.W. 1124. In this case the catalog of a seed company contained a printed disclaimer of any warranty, and the shipping tag also had a similar statement, as had the invoice of the shipment, which contained the additional statement that if the purchaser would not accept the goods on those terms, they might be returned and the money would be refunded, and it ap-

peared that the buyer had no knowledge or information of these disclaimers of warranty and that such a disclaimer was not printed upon the package in which the seed was delivered to him. In holding that he was chargeable with knowledge of the fact that the seller refused to warrant the seeds sold the Court said:

> "The defendant having the right to sell without warranty, it seems clear that it did all that could in reason be required of it to advise the purchaser of the condition upon which the seed was sold. Of course it is easy to imagine other things which it might have done which would be better calculated to give notice, but if those things had been done, and had proved inefficacious, still other things might be suggested which would surely acquaint Morton with the conditions of sale. The business was transacted by mail. Where the book from which the order was given, the shipping tag, and the invoice, all stated these conditions, it would seem to be unreasonable to hold that any blame attached to the defendant if Morton failed to observe all of these things. . . Mr. Morton could not close his eyes to the information that was literally staring him in the face and then hold the defendant liable because he did so. In matters of contract one must observe what he has reasonable means of knowing. The law for the protection of persons even against fraud will not be extended to those who 'having the means in their own hands neglect to protect themselves . . . The law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may

be supposed to be within reach of their observation and judgment and not close their eyes to the means of information which are accessible to them.' Mamlock v. Fairbanks (1879) 46 Wis. 415, 417, 418, 1 N.W. 167, 169, 32 Am. Rep. 716; Bostwick v. Mutual L. Ins. Co. (1902) 116 Wis. 392, 400, 89 N.W. 538, 92 N.W. 246, 67 L.R.A. 705. And where a purchaser is put upon inquiry as to the quality of the thing offered for sale, he is bound to know what is discoverable in regard thereto by the exercise of ordinary care, and he cannot 'close his eyes to defects which are before him or to information which is at hand.' Warner v. Benjamin (1895) 89 Wis. 290, 62 N.W. 179. In the absence of fraud 'a man cannot relieve himself from the obligation of a written agreement by saying he did not read it when he signed it, or did not know what it contained.' Deering v. Hoeft (1901) 111 Wis. 339 (87 N.W. 298), and cases cited on page 343; Steffen v. Supreme Assembly of Defenders (1907) 130 Wis. 485, 487, 110 N.W. 401."

The *Ross* case was followed in California in the *Miller v. Germain Seed & Plant Co.* (1924) 193 Cal. 62, 222 P. 817, 32 A.L.R. 1215. In that case the buyer ordered by letter from the seller, who was in the business of furnishing seed for agricultural purposes, a certain kind of celery seed. It was conceded by the Court that from a transaction of this character the law implies a contract of warranty, and the question in the case was whether or not such a warranty was negatived by a disclaimer existing in the form of a custom not in any way to warrant seed. Holding that

the case should have been submitted to the jury upon an instruction in effect that the warranty relied upon was negatived if the jury found as a fact that there was a custom in the trade not to warrant the description, quality, or productiveness of seeds bought or sold, and that this custom was a well-established one and well known both to those buying and selling seed, the Court expressly declared that this custom or usage would control the transaction in question even though the custom was not known to the particular buyer. The Court said:

> "The rule seems to be uniform that a party to a contract may be bound by a custom not inconsistent with the terms of the contract, even though he is ignorant of the custom, if the custom is of such general and universal application that he may be conclusively presumed to know the custom."

This case was followed by *Lehner v. Germain Seed & Plant Co.* (1924) 192 Cal. 782, 222 P. 834.

We call the Court's attention to the fact that the California Supreme Court in the *Miller v. Germain Seed & Plant Co.* quoted extensively from the *Ross v. Northrup, K. & Co.,* supra, and followed its entire reasoning as appears on pages 67 and 68 of the *Miller* case.

The next California case concerning the sale of seeds was the *William A. Davis Co. v. The Bertrand Seed Co.* (1928) 94 Cal. App. 281, 271 P. 123. That case held that a disclaimer of an intent to warrant

the description, quality or productiveness of seeds, sold by one wholesale dealer in seeds to another, in a printed statement preceding the typewritten portion of a letter embodying an offer to sell, and in every letter received by the buyer throughout the correspondence, was binding on the buyer, who was aware of the contents, purpose, and intent of the printed statement, and relied on a claim of fraud and breach of honor and fair play in the seller's representation that it exercised great care to have all seeds pure and reliable, rather than on the disclaimer as such. The Court based its holding on the rule that,

> ". . . the binding effect of a statement printed upon a letterhead or some other paper delivered to the acceptor of an offer depends on whether the person receiving it should understand, as a reasonable man, that it contains the terms of the contract, which must be read at his peril and regarded as part of the proposed agreement."

The Court further held in regard to the language used concerning the sale, the following:

> "Furthermore, as regards respondent's claim that in face of the non warranty clause the following language is sufficient to show an intent on the part of the seller to give an express warranty as to variety and purity: 'The stock offered was all choice seedsmen stock and double milled.'
>
> As shown at Page 103, 93 Cal. (222 P. 833), the dissenting opinion in the case of Miller v. Germain Seed & Plant Co., supra, statements of much stronger import were contained in the seller's printed catalogue and were evidently not

considered by the court of sufficient import to nullify the effect of a mere custom. And in the case at bar the language relied upon should be and can be construed in a reasonable sense which will preserve and not do violence to the plain meaning of the express language of the non-warranty clause; and be construed simply in connection with the statement touching care in the selection and expressive merely of an opinion in good faith as to the general merits of the defendant's stock in trade."

The above *Bertrand* case clears any doubt that might arise concerning a warranty when the Appellant agreed that these stocks were all choice quality stocks, true to type, and that he was merely stating his opinion in good faith as to the description of the stock, and was in no way warranting that the stock would answer the description of the seed purchased by the Appellee.

The *Bertrand* case was followed in California in the case of *Sutter v. The Associated Seed Growers* (1939) 31 Cal. App. (2d) 543 and 88 P. (2d) 144, which held that the statutory implied warranty of fitness does not apply to a sale where the seller expressly disclaims liability for the quality of the thing sold.

The California case above quoted should uphold the theory that a seedsman may validly disclaim any responsibility as to description, quality or productiveness, or any matter of the seed sold and will not be in any way responsible for the crop and these cases

coincide with what is now considered the majority opinion in this type of sale throughout the United States. The validity of the disclaimer clause has been upheld in the following cases: The *Leonard Seed Company v. Crary Canning Company* (1911) 147 Wis. 166, 132 N.W. 902. The disclaimer clause in the contract was held valid as to variety.

In *Kibbe v. Woodruff* (1920) 94 Conn. 443, 109 Atl. 169, the disclaimer on an order placed was held valid as to variety of seed sold.

In *Calhoun v. Brinker* (1907) 17 Ohio Decisions, Page 705, the disclaimer on a packet of seeds was held valid as to the variety of the seeds.

In *Seattle Seed Company v. Fujimori* (1914) 79 Wash. 123, 139 P. 866, the disclaimer on the identification slip placed inside the package of seed was held valid as to variety.

In *Manglesdorf Seed Company v. Busby* (1926) 118 Okla. 255, 247 P. 410, a disclaimer orally communicated to the buyer was held valid.

In *Larson v. Inland Seed Co.* (1927) 143 Wash. 557, 255 P. 919, the disclaimer on the packet of seeds was held valid.

In *Hoover v. Utah Nursery Co.* (1932) 79 Utah 12, 7 P. (2d) 270, the disclaimer on the packet was held valid.

In *Blizzard Brothers v. Growers Canning Company* (1911) 152 Iowa 257, 132 N.W. 66, the non-warranty on the package of the seed was held valid.

In *Lombrazo v. Woodruff* (1931) 256 N.Y. 92, 175 N.E. 525, the disclaimer in the contract was held valid.

In *Landreth Seed Co. v. Kerlec Seed Co.* (1930) La., 126 So. 460, the disclaimer in the invoice and the catalogue was held valid.

In *Petterson v. Parrott* (1930) Maine, 152 Atlantic 313, the disclaimer on the order sheet was held valid.

In *Kennedy v. The Cornhusker Hybrid Co.* (1945) Neb., 19 N.W (2d) 51, 160 A.L.R. 351, the disclaimer on the invoice and tag were held valid.

In *J. S. Elder Grocery Co. v. Appelgate* (1922) Ark., 237 S.W. 92, the disclaimer in an advertisement was held to be valid.

In *Belt Seed Co. v. Mitchelhill Seed Co.* (1941) 236 Mo. App. 142, 153 S.W. (2d) 106, the disclaimer in the seller's confirmation of sale was held to be valid.

In the *Eastern Seed Co. v. Pyle* (1946) Texas, 198 S.W. (2d) 562, the disclaimer clause contained in the contract was held valid.

In conclusion it is Appellant's contention that the disclaimer or non-warranty clause is contained in the surplus list, Plaintiff's Exhibit 7, on page 114 of the transcript of record negatived any implied warranty which the law would impose in a sale of goods by description.

WHAT EFFECT WOULD THE SALES ACT HAVE UPON THE VALIDITY OF THE NON-WARRANTY CLAUSE?

The Uniform Sales Act would not effect the validity of the non-warranty clause.

Although there are no California cases on the validity of the disclaimer clause subsequent to the *Bertrand Seed* case, supra, other jurisdictions which have adopted the Uniform Sales Act have reconciled the two.

In the case of *Lombrazo v. Woodruff* (1931) 256 N.Y. 92, 175 N.E. 525, 75 A.L.R. 1017, it was held that the non-conformity of onion sets to the description under which they were sold gave the buyer no cause of action for damages against the seller where the contract of sale (governed by the provision of the Uniform Sales Act which makes conformity of goods to the description under which sold an implied warranty) contained a disclaimer warranty clause as follows: "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds sent out, and will be in no way responsible for the crop." The Court remarked that the word "warranty" as used in the contract of sale had reference to those warranties defined in the Uniform Sales Act, unless it was otherwise defined or restricted; that the parties in the disclaimer of warranty clause exercised a right and privilege expressly reserved to them by a provision of the personal property law, declaring,

> "Where any right, duty or liability would arise under a contract to sell or a sale by implica-

tion of law it may be negatived or varied by express agreement, or by the course of dealing between the parties or by custom, if the custom be such as to bind both parties to the contract or the sale.

A disclaimer by a seller of seeds by a description of any implied warranty of the conformity of the seeds to the description is not contrary to public policy."

In upholding the non-warranty clause the Court in *Hoover v. The Utah Nursery Co.* (1932) 79 Utah, page 12, 7 P. (2d) 270, remarked that,

"Although the Uniform Sales Act in force in this jurisdiction provides that, where there is a sale of goods by description, there is an implied warranty that the goods shall correspond with the description, this same Act further provides that when any right, duty, or liability shall arise under a sale by implication of law, it may be negatived or varied by express agreement or by course of dealing between the parties, or by custom, if the custom be such as to bind both parties."

In the case of *Kennedy v. The Cornhusker Hybrid Co.* (1945) 19 S.W. (2d) 51, 160 A.L.R. 351, the Court in upholding the disclaimer clause and reconciling its validity with the Sales Act stated:

"The Nebraska Uniform Sales Act . . . clearly recognizes the almost uniform rule that one who sells personal property may effectually disclaim as to any warranty in connection with the sale.

Section 69-471, R.S. 1943, provides:

'Where any right, duty, or liability would arise under a contract to sell or a sale by implication of law it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.'

It is stated in 55 Corpus Juris, Section 707, page 730:

'The seller's refusal to warrant is not repugnant to or voided by, the provisions of the Uniform Sales Act relative to implication of warranty,' and, 'when the seller has expressly refused to warrant the property in certain particulars there can be no implied warranty of a character covering those particulars . . .'

The statement is made in 55 Corpus Juris, Sec. 698, Page 710:

'The seller of property may by disclaimer of warranty refuse to warrant the property sold unless a disclaimer of warranty is contrary to the statutory provisions; . . .' And, 'any disclaimer of warranty so expressed that its existence and nature is understood by the parties to the sale as constituting a term of the bargain operates thus: as for instance, where the buyer is given to understand that he must take the property, if at all, on his own judgment, and a provision of non-warranty may be operative when used in letterheads or containers in which the subject matter of the sale is sold, on bills for the price of goods, in notes for the purchase price, or in catalogues'.''

The Court will note that in the adoption of the Uniform Sales Act that the provisions contained as to non-warranty in the cases above cited are identical with Section 1791 of the Civil Code of the State of California.

The Appellant submits to the Court that when he sent the surplus list to the Appellee with the standard seedmen's disclaimer clause clearly printed on it that he was inviting offers for the seeds that he had on hand and were for sale with the condition that he would not warrant the description of the seeds and that this non-warranty was not repugnant to or voided by the Uniform Sales Act or public policy.

WHAT EFFECT WOULD CUSTOM AND USAGE HAVE ON THIS CONTRACT?

The custom and usage became an integral part of the contract. The California Courts in the case of *Miller v. Germain Seed & Plant Co.* in 193 Cal., at page 67, in quoting from the case of *Ross v. Northrup,* 156 Wis. 327, 144 N.W. 1124 (1914) said:

> "It is not the law that ignorance of a general trade custom relieves the party from the effect of it. If there was a general custom among seedsmen such as was found, Morton as a retail dealer in seeds was bound to know of it.
>
> 'The object of proving a general custom is not to contradict or change a contract made between the parties, but to interpret it to the court and jury as it was understood between the parties at

the time it was made and this evidence of a general custom, when it does not contradict or change the express terms of the written contract is admitted for the purpose of showing what the real contract between the parties was, and when it is clearly proven the parties are supposed to have contracted with reference to such custom, unless such custom changes the express terms of the written contract.'

A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract. Where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed, for the reason that the majority of such transactions are had in view of the custom and the agreement on which the minds of the parties actually met will thereby be carried into effect. Where the custom is proved to be known to both it may even add terms to the contract. Where the custom is general it will be presumed to have entered into the contract and one may be bound thereby although ignorant unless the other party be shown to have knowledge of his ignorance."

The California Courts in following the *Miller v. Germain Seed & Plant Co.* case, supra, have held that a party to a contract may be bound by a custom not inconsistent with the terms of the contract even though he is ignorant of the custom if the custom is of such general and universal application that he may be presumed to know of it.

Pastorino v. Greene Brothers (1949) 90 Cal. App. (2d) 481, and

Newcomb v. Sainte Claire Realty Company, 55 Cal. App. (2d) 437, and in 130 P. (2d) 793.

The Appellant in this case submits to the Court that the usage and custom in the seed business not to warrant the description of seeds was an integral part of this contract of sale, not only because of the disclaimer clause as printed in the surplus list, but also because of usage and custom in the seed business not to warrant the seeds sold. That the Appellee had knowledge of this custom and usage; Appellant has shown in Plaintiff's Exhibit 6, Page 111 of the transcript of record that on the letterhead of the Barteldes Seed Company is printed the standard seedmen's disclaimer clause as used by the Barteldes Seed Company.

FINDINGS OF FACT.

In conclusion the Appellant respectfully submits to the Court that the contract in this case was made in the State of California when the offer of sale was accepted by the Appellant; was performed in the State of California when the Appellant delivered the goods to the carrier at Stockton, California, and that the non-warranty clause in the surplus list negatived any implied warranty that might arise in the sale of goods by description and that the Appellee knew of and used the non-warranty clause and that in the formation of this contract the fact that the Appellant did not warrant the description or variety of the seeds sold became an integral part of the sale.

The Appellant contends that the Court erred in denying the defendant's motion to amend the findings of fact and that additional findings of fact be made. Referring the Court's attention to Paragraph 3 of the Findings of Fact, the Appellant contends that he accepted the seed offer and agreed to sell the plaintiff said quantity of onion seeds of said variety known as "Yellow Globe Danvers" at and for said purchase price f.o.b. Stockton, California and to deliver the same f.o.b. Stockton, California, that said agreement was confirmed in writing; . . . that on or about October 28, 1943 defendant delivered to plaintiff f.o.b. Stockton, California 2005 pounds of onion seeds . . . The statement of fact as therein set forth is inconsistent with the memorandum and order of the Court as shown on page 23 of the transcript of record and Plaintiff's Exhibits 5 and 6 in which it was stated that the onion seed purchased was to be delivered f.o.b. Stockton, California and did not state the goods were to be delivered to the plaintiff at Denver, Colorado.

The Appellant contends that the Court erred in not including as a Finding of Fact that a non-warranty clause was contained in the surplus list as shown in the surplus list, Plaintiff's Exhibit 7, on Page 114 of the transcript of record.

Appellant contends that the Court erred in not finding that the manner of shipping the seeds with a seller's order bill of lading with sight draft attached was done for the sole reason of security for the pur-

chase price. This is substantiated in the testimony of Hugh L. Jones on Page 81 of the transcript of record.

It is contended by the Appellant that the Court erred in not finding that the contract was made in Stockton, California and was performed in Stockton, California. That the contract was made in California is shown in the Memorandum of Order of the District Court set forth in page 23 of the transcript of record, which states that the offer to purchase 2000 pounds of seed at $2.50 a pound was accepted by the defendant in California, and that it was agreed that this seed would be shipped by truck f.o.b. Stockton, California. The fact that the contract was performed in California is also confirmed by the testimony of Hugh L. Jones that the freight was delivered as shown on page 77 of the transcript of record.

Dated, Stockton, California,
February 21, 1951.

Respectfully submitted,
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ALBERT E. CRONIN, JR.,
Attorneys for Appellant.